



ENERGYPLUS™ COLLABORATIVE DEVELOPER'S LICENSE AGREEMENT



EnergyPlus™ Version: _____

This license agreement (the "Agreement") is entered into by The Regents of the University of California, Department of Energy contract-operators of the Ernest Orlando Lawrence Berkeley National Laboratory, 1 Cyclotron Road, Berkeley, CA 94720 ("Berkeley Lab"), and the entity listed below ("Developer") having its principal place of business at the address below:

Company/Institution ("Developer"): _____

Name of responsible Developer employee: _____

Title or position: _____

Department (if applicable): _____

Address: _____

City / State / Postal Code / Country: _____

Tel: _____ Fax: _____

E-Mail: _____ Web: http://_____

Check here if you are funded under a Berkeley Lab R&D Subcontract. Enter Subcontract No. here: _____

The EnergyPlus™ building energy simulation computer program has been developed jointly by the University of Illinois at Urbana-Champaign ("UIUC") and Berkeley Lab under funding from the U.S. Department of Energy. It is a new software program based on concepts from IBLAST, the integrated version of UIUC's BLAST program, and Berkeley Lab's DOE-2™ program. Berkeley Lab has the authority to administer the licensing of EnergyPlus™ software for UIUC. Developer desires to obtain, and Berkeley Lab is willing to grant, the right to (a) use the specified version of the Software (as defined below) for Developer's internal non-commercial purposes; and (b) develop enhancements to the Software which Developer desires Berkeley Lab and UIUC to consider for incorporation, at their sole discretion, into future versions of the Software.

The parties now agree as follows:

1. DEFINITIONS

1.1 "Designated System" means computer hardware owned or leased by, and the accompanying operating system licensed by, Developer.

1.2 "Developed Work" means any software code, in source code, object code, or executable form, together with any associated media, printed materials, and on-line or electronic documentation (if any), developed by or on behalf of Developer, designed to either (i) enhance or otherwise modify the features, functionality, or performance of the Software, or (ii) function as an interface linking the Software to another stand-alone energy-related software program; regardless of whether such developed code is a "derivative work" of the Software pursuant to the Copyright Act, 17 USC §101 et seq.

1.3 "Effective Date" means the date this Agreement is signed by both parties. If the parties sign the Agreement on different days, the Effective Date shall be the later of the signing dates.

1.4 "Software" means the version of the EnergyPlus™ program noted above, in source code, object code, and executable form, together with any associated media, printed materials, and on-line or electronic documentation (if any).

2. GRANT

2.1 Right to Use. Subject to payment of applicable license fees by Developer (if any) and subject to receipt by Berkeley Lab of any required U.S. Department of Energy approvals, Berkeley Lab hereby grants Developer, and Developer hereby accepts, the non-exclusive, royalty-free right to install, use and compile the Software, and prepare derivative works thereof, subject to the following terms and conditions:

- (a) Developer will only use the Software for its own internal non-commercial use;
- (b) Developer will only use the Software on the Designated System. Developer will not transfer the Software from the Designated System without the prior written consent of Berkeley Lab;
- (c) Developer will not copy the Software except as necessary to carry out its rights and obligations under this Agreement, including but not limited to copying the Software for back-up or archival purposes only; *provided however* that (i) Developer will reproduce onto any copies of the Software all titles, trademarks, disclaimers, and copyright and restricted rights notices, and (ii) all copies of the Software, in whole or in part, shall be subject to the terms and conditions of this Agreement;

- (d) Developer will not rent, lease, loan, distribute, sell, or otherwise transfer the Software to any third party; and
- (e) Developer will not incorporate the Software into any other product without the express prior written consent of Berkeley Lab.

2.2 Distribution of Software. Developer will not distribute the Software, in whole or in part, to any third party in stand-alone form or as incorporated into or bundled with the Developed Work; *provided however* that if an organization sponsors Developer's development of a Developed Work, then Developer may deliver one (1) copy of the executable form of the Software as incorporated into or bundled with the Developed Work to such sponsoring organization for their non-commercial, internal use only, provided that such sponsoring organization has procured in advance a valid license to use the Software from either Berkeley Lab or UIUC.

2.3 Ownership of Software. Subject to approval by the U.S. Department of Energy: (i) Developer hereby acknowledges that the Software is protected by United States copyright law and international treaty provisions; (ii) Berkeley Lab, UIUC, and their licensors hereby reserve all rights in and to the Software which are not explicitly granted to Developer herein; (iii) without limiting the generality of the foregoing, Berkeley Lab, UIUC, and their licensors retain all title, copyright, and other proprietary interests in the Software and any copies thereof, and Developer does not acquire any rights, express or implied, in the Software, other than those specifically set forth in this Agreement.

2.4 Ownership of Developed Works. Subject to the underlying copyright in the Software of Berkeley Lab, UIUC, and their licensors pursuant to Article 2.3 above, Developer retains all title, copyright, and other proprietary interests in any Developed Works and any copies thereof, and Berkeley Lab does not acquire any rights, express or implied, in such Developed Works, except as specifically set forth in this Agreement, or as otherwise may be (i) set forth in writing in Developer's R&D Subcontract with Berkeley Lab (if any), or (ii) provided for under applicable federal law or regulations. Developer shall take all actions necessary to obtain from its employees or consultants clear title to the Developed Works to comply with this Article 2.4 and, if applicable, Article 2.6. Developer shall provide Berkeley Lab with a copy of all Developed Works, including any work in progress, promptly upon request of Berkeley Lab.

2.5 No Maintenance or Support. Neither Berkeley Lab nor UIUC are under any obligation whatsoever to: (i) provide maintenance or support for the Software or Developed Work, or (ii) to notify Developer of upgrades to the Software (if any). If, in their sole discretion, Berkeley Lab or UIUC make a Software upgrade available and Developer uses or accesses such upgrade, then such upgrade shall be deemed incorporated into the Software and subject to the terms and conditions of this Agreement.

2.6 License Grant-Back for Developed Works.

- (a) Grant-Back of Rights. Developer hereby grants Berkeley Lab, UIUC, and the U.S. Government and others acting on its behalf, a royalty-free, paid-up, non-exclusive, perpetual, worldwide, irrevocable license to use, copy, modify, sublicense, display publicly, distribute, and prepare derivative works of the source code, object code, and executable form of any Developed Work, in whole or in part, in stand-alone format or as incorporated into or bundled with the Software, and to permit others to do so.
- (b) Special Provisions Applicable to User Interfaces. The scope of the grant-back license of paragraph 2.6(a) is narrowed with respect to that portion of a Developed Work constituting a user interface that is an original work developed or licensed by Developer ("Developer's GUI"). "Developer's GUI" specifically excludes any portion of a user interface to the extent that its source code incorporates Software source code first licensed to Developer hereunder (including but not limited to the IDF Editor source code), or modifications thereof. Regarding Developer's GUI:
 - (i) Developer shall not be obligated to provide Berkeley Lab with the source code of Developer's GUI; and
 - (ii) the grant-back license of paragraph 2.6(a) shall be limited, solely with respect to Developer's GUI, to the right to use and copy Developer's GUI, in object code and executable forms only, for test and evaluation purposes only, without right to sublicense or distribute.
- (c) Exemption for Berkeley Lab Subcontractors. This Article 2.6 shall not apply to Developed Works created by Developer pursuant to an R&D Subcontract between Developer and Berkeley Lab (if any), the subcontract number of which is noted above – instead, the terms and conditions of such R&D Subcontract apply.

2.8 Notice. The U.S. Government has been granted for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable, worldwide license in the Software to reproduce, prepare derivative works, and perform publicly and display publicly. Beginning five (5) years after the date permission to assert copyright is obtained from the U.S. Department of Energy, and subject to any subsequent five (5) year renewals, the U.S. Government is granted for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable, worldwide license in the Software to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so.

3. **TERM AND TERMINATION**

3.1 Term. Unless otherwise terminated pursuant to this Article 3, this Agreement shall remain in full force and effect in perpetuity.

3.2 Termination by Developer. Developer may terminate this Agreement at any time upon written notice to Berkeley Lab.

3.3 Termination by Berkeley Lab. Berkeley Lab may terminate this Agreement upon written notice to Developer if Developer breaches the terms and conditions of this Agreement and fails to correct such breach within thirty (30) calendar days of receipt of written notice specifying such breach.

3.4 Effects of Termination. Upon termination of this Agreement for any reason whatsoever, Developer shall immediately cease using the Software and all of the rights granted to Developer pursuant to this Agreement shall immediately cease. Developer shall promptly, at Berkeley Lab's option, either return all copies of the Software to Berkeley Lab, or destroy or erase all copies of the Software and furnish Berkeley Lab with written notice, signed by an officer of Developer, certifying that all copies of the Software have been destroyed or erased.

3.5 Delivery of Developed Work. Developer shall provide Berkeley Lab with a copy of the most recent version of all Developed Works, whether in final form or a work in progress, at the earlier of (i) the annual anniversary date of this Agreement, and/or (ii) termination of this Agreement.

3.6 Preservation of Remedies. All remedies hereunder, including, without limitation, the termination of this agreement, injunctive relief, and all other remedies provided at law or in equity (and not specifically excluded pursuant to the terms of this Agreement) shall be deemed cumulative and not exclusive.

3.7 Survival. Notwithstanding any provision of this Section 3, Sections 3, 4, and 5 shall survive termination of this Agreement.

4. DISCLAIMERS, LIMITATIONS & INDEMNITY

4.1 Warranty Disclaimer. THE SOFTWARE IS SUPPLIED "AS IS" WITHOUT WARRANTY OF ANY KIND. BERKELEY LAB, UIUC, THE UNITED STATES, THE UNITED STATES DEPARTMENT OF ENERGY, AND THEIR EMPLOYEES: (1) DISCLAIM ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT, (2) DO NOT ASSUME ANY LEGAL LIABILITY OR RESPONSIBILITY FOR THE ACCURACY, COMPLETENESS, OR USEFULNESS OF THE SOFTWARE, OR ANY DEVELOPED WORKS THEREOF, (3) DO NOT REPRESENT THAT USE OF THE SOFTWARE WOULD NOT INFRINGE PRIVATELY OWNED RIGHTS, (4) DO NOT WARRANT THAT THE SOFTWARE WILL FUNCTION UNINTERRUPTED, THAT IT IS ERROR-FREE OR THAT ANY ERRORS WILL BE CORRECTED.

4.2 Limitation of Liability. IN NO EVENT WILL BERKELEY LAB, UIUC, OR THEIR LICENSORS BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND OR NATURE, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR LOSS OF DATA, FOR ANY REASON WHATSOEVER, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), OR OTHERWISE, EVEN IF BERKELEY LAB, UIUC, OR THEIR LICENSORS HAS BEEN WARNED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES. IN NO EVENT SHALL BERKELEY LAB'S, UIUC'S, OR THEIR LICENSORS' LIABILITY FOR DAMAGES ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE AMOUNT PAID BY DEVELOPER FOR THE SOFTWARE.

4.3 Indemnity. Developer shall indemnify, defend, and hold harmless Berkeley Lab, UIUC, the U.S. Government, the Software developers, the Software sponsors, and their agents, officers, and employees, against any and all claims, suits, losses, damage, costs, fees, and expenses arising out of or in connection with this Agreement. Developer shall pay all costs incurred by Berkeley Lab in enforcing this provision, including reasonable attorney fees.

5. MISCELLANEOUS

5.1 Confidentiality. Developer will take appropriate steps to ensure that the source code form of the Software remains confidential and is protected against unauthorized disclosure, use, or release, and will treat it with at least the same level of care as Developer would use to protect and secure Developer's own confidential information, but in any event using no less than a reasonable standard of care.

5.2 Governing Law. This Agreement, and any disputes arising out of or in connection with this Agreement, shall be governed by and construed in accordance with the laws of the State of California, excluding its rules governing conflicts of laws.

5.3 Notices. All notices, reports, and other communications to either party pursuant to this Agreement will be made in writing (including any facsimile transmission or similar writing) and sent either by first-class mail, postage prepaid, or by courier, hand-delivery, or facsimile to the contact address for each party specified or to such other persons or addresses as the parties may designate by written notice from time to time. Each such notice, report, or other communication will be effective (i) if given by facsimile, upon receipt of transmission confirmation; (ii) if given by overnight courier, on the second day after delivery to such courier; (iii) if mailed by first-class mail, postage prepaid, on the fourth day after mailing; and (iv) if given by any other means, upon receipt at the specified address. Developer's address for purposes of notice shall be the address specified in the preamble above. Berkeley Lab's address for purposes of notice shall be:

Lawrence Berkeley National Laboratory
Technology Transfer Department
One Cyclotron Road, MS 90-1070
Berkeley, CA 94720
Attention: Licensing Manager
Fax: 510/486-6457
Tel: 510/486-6467

5.4 Relationship of the Parties. The parties undertake their respective obligations under this Agreement as independent contractors. This Agreement will not create a(n) employee, agency, or partner relationship nor a partnership or joint venture between the parties for any purpose.

5.5 U.S. Export Controls. Developer shall observe all applicable United States and foreign laws and regulations (if any) with respect to the export, re-export, diversion or transfer of the Software, related technical data and direct products thereof, including, without limitation, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations.

5.6 No Endorsement. References in the Software or this Agreement to any specific commercial products, process, or service by trade name, trademark, manufacturer, or otherwise, does not constitute or imply its endorsement, recommendation, or favoring by the U.S. Government, the University of California, UIUC or Berkeley Lab. In accordance with California Education Code Section 92000, Developer shall not use in advertising, publicity or other promotional activities any name, trade name, trademark, or other designation of the University of California; nor shall Developer so use "University of Illinois at Urbana-Champaign", "Ernest Orlando Lawrence Berkeley National Laboratory" or "United States Department of Energy" (including

any contraction, abbreviation, or simulation of any of the foregoing) without Berkeley Lab's prior written consent.

5.7 Waiver. The failure of either party to assert any of its rights under this Agreement shall not be deemed to constitute a waiver of that party's right thereafter to enforce each and every provision of this Agreement in accordance with its terms.

5.8 Headings. The headings and subheadings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

5.9 Severability. The invalidity or unenforceability of any provision of this Agreement shall in no way affect the validity or enforceability of any other provision of this Agreement.

5.10 Assignment. This Agreement is binding upon and shall inure to the benefit of Berkeley Lab, its successors and assigns. Upon written notice to Berkeley Lab, Developer may assign this Agreement to its wholly owned subsidiary. Any other attempt by Developer to assign or otherwise transfer this Agreement is void

unless Developer obtains the prior written consent of Berkeley Lab, such consent not to be unreasonably withheld.

5.11 Entire Agreement. This Agreement, together with the R&D Subcontract referenced above (if any), constitutes the full, complete, and entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings between the parties, whether written or oral, relating to the same subject matter. No modification or amendment of this Agreement shall be effective unless in writing and executed by a duly authorized representative of each party.

5.12 Counterparts. This Agreement may be executed in two counterparts, each of which will be deemed an original, but both of which together constitute one and the same instrument.

IN WITNESS WHEREOF the parties have caused their duly authorized representatives to execute this Agreement on the date written below, to be effective as of the date of the last party's signature below.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
THROUGH THE ERNEST ORLANDO LAWRENCE
BERKELEY NATIONAL LABORATORY

DEVELOPER

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____